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No. 04-1581

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In The

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* AARP, COMMON CAUSE, INC., THE GREENLINING INSTITUTE, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, AND UNITED STATES PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization comprised of more than 35 million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans through advocacy, information, and services. AARP is nonpartisan and does not support or oppose any candidate for public office. Nor does it contribute money to political candidates' campaigns or to political parties. Older Americans have made clear their interest in promoting and protecting the integrity of our nation's electoral process. Because of the significance of campaign finance reform to its members, AARP was active in supporting enactment of the Bipartisan Campaign Reform Act (BCRA), and filed a brief as *amicus curiae* in this Court in *McConnell v. Federal Election Commission*. The issues in this case involving electioneering communications provisions of BCRA directly affect the interest of AARP in protecting the integrity of our election processes.

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 300,000 members and supporters nationwide. Common Cause has had a long-standing concern with the growing problem of soft money in the federal political process, and has publicly advocated for congressional action to ban soft money in order to restore integrity to the electoral system. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002 and filed an

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[1] *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of both parties, as indicated by letters of consent filed with the Court.

amicus brief in this Court in *McConnell v. Federal Election Commission*.

The Greenlining Institute is a non-partisan, non-profit organization that works to improve the quality of life for low-income and minority communities throughout the United States. The institute was founded in 1993 and emerged from the Greenlining Coalition, considered the oldest coalition of African American, Asian American/ Pacific Islander, and Latino community leaders organized around a common purpose. The Greenlining Institute's major mission is to create an antidote to redlining practices which have had adverse consequences in the ability of low-income and minority communities to obtain financial services and products.

The League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy. The League is organized in more than 850 communities in every state and has more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

The National Association of State PIRGs ("U.S. PIRG") represents state Public Interest Research Groups ("PIRGs") at the federal level, including in the federal courts. In addition, U.S. PIRG and other state PIRGs have an interest in campaign finance issues, and the resolution of this case will assist U.S. PIRG and other state PIRGs in its advocacy for effective and comprehensive campaign finance reforms.

SUMMARY OF ARGUMENT

Partly in response to mounting sham issue advocacy in federal elections, all of which evaded reasonable restrictions on corporate and labor election spending as well as long-standing disclosure requirements, Congress passed and the President signed the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). One of its central provisions, Title II, barred corporations and unions from funding so-called "electioneering communications" and required disclosure of "electioneering communications" funded from other sources. In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court upheld those provisions except insofar as they applied to certain "ideological nonprofits" meeting the strict conditions this Court had outlined earlier in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986).

Wisconsin Right to Life, Inc. ("WRTL") now seeks to relitigate this recent holding. Although it couches its challenge to these same provisions as limited to their application to vaguely defined "grassroots lobbying," WRTL is making the same arguments that this Court rejected in *McConnell* and supporting those arguments with ads that are virtually identical to the ones this Court considered there. This Court has seen, carefully considered, and recently rejected all of WRTL's arguments.

Furthermore, like the sham issue ads considered in *McConnell*, these "grassroots lobbying" ads aim to promote particular candidates in federal elections and likely have that effect. They are, in short, the "functional equivalent of express advocacy," which this Court found Congress could regulate in *McConnell*. 540 U.S. at 206. Although WRTL claims that these ads intend only to encourage voters to lobby their representatives on legislation, none of these ads actually mentions specific legislation or directly gives voters the rudimentary information they would need to

place a phone call or write a letter or email to their representatives.

WRTL and some amici supporting it also argue that BCRA's electioneering communications provisions place particular burdens on so-called § 501(c)(3) organizations, which receive generous tax subsidies under the Internal Revenue Code ("IRC"). Their arguments, however, get the law exactly backwards. However laudable its aims and ambitions, no organization has a right to public monies obtained through a tax subsidy or otherwise to spend on its own political speech. Congress, of course, must give it other ways to make such speech without public subsidy and Congress has done so here.

ARGUMENT

A. In Pressing for a "Grassroots Lobbying" Exception to BCRA's Electioneering Communications Provisions, WRTL Is Attempting to Relitigate *McConnell*.

In *McConnell*, plaintiffs argued, just as WRTL does here, that BCRA's electioneering communications provisions were unconstitutional because they covered ads meant to have legislative rather than electoral effects. The only difference was that in *McConnell* plaintiffs claimed that such reach invalidated the electioneering communications provisions in their entirety whereas now WRTL claims that it invalidates them only insofar as they touch grassroots lobbying. This is a distinction, however, without a difference.

1. The Arguments Are Identical.

In their briefs and at oral argument the *McConnell* plaintiffs – including the National Right to Life Committee (NRLC), represented by WRTL's counsel in this case – pressed hard one main argument: that Title II, if upheld,

would unconstitutionally impinge on efforts to influence legislation, particularly grassroots lobbying. The NRLC reply brief in *McConnell*, for instance, put squarely before this Court the same issues WRTL now raises here – the alleged unconstitutional impact of Title II on grassroots lobbying. Indeed, NRLC there said that Title II will "eliminate a whole *category* of American political speech by citizen groups for nearly a fourth of the year":

> That whole category of speech is *grass roots lobbying*, in which Citizens Associated for Amplified Free Expression, Inc. – during the bustling days of legislative activity just before the fall election as representatives try to ram through bills to buy votes before taking a recess to run home for final campaigning before the polls open – buys broadcast ads in the district of the legislator with an important vote needed to pass legislation protecting the nation from ruin by encouraging citizens to "Call Representative Swing-Vote and ask her to vote for the bill sponsored by Representatives Commonweal and Controversy."
>
> Defendants [sic] assertions that (1) genuine issue advocacy can readily be accomplished in a manner that does not trigger Title II of BCRA, and (2) that it is not necessary to refer to specific candidates for federal office in order to create effective [issue] ads, simply does not apply to grass roots lobbying. And citizen groups need to remain free to engage in grass roots lobbying through the media that Defendants concede is the most effective, during the time when legislation is being considered, which often can and often does fall during the days just before an election – the timing of which is wholly beyond the control of citizen groups and wholly in the hands of incumbent politicians.

> Grass roots lobbying is a fundamental part of our system of representative government that must remain available whenever it is needed. It is not a few marginal applications. And it is profoundly, negatively affected by Title II of BCRA.

Reply Br. of Appellants/Cross-Appellees National Right to Life Committee, *et al.* at 6-7, 540 U.S. 93 (2003) (No. 02-1733) (emphasis in original) (internal citations and some internal quotation marks omitted).

The National Rifle Association argued much the same in its brief challenging Title II:

> Title II's restriction on electioneering communications also fails the narrow tailoring standard because it unfairly criminalizes *numerous categories of speech* that are not intended to, and will not have the effect of, influencing federal elections. The NRA's extensive independent expenditures on television and radio broadcasting are designed to serve three principal purposes: (1) to educate the public about Second Amendment and related firearm issues, including pending legislative initiatives. . . .
>
> Broadcasts that urge viewers and listeners to oppose or support pending legislation do not implicate the concerns that allegedly animate Title II. Just as this Court has recognized that speech pertaining to referenda does not raise a substantial concern about corruption, so too speech urging the passage or defeat of pending legislation does not carry any threat of corrupting the political process.

Br. for Appellants the National Rifle Association, *et al.* at 35-36, 540 U.S. 93 (2003) (No. 02-1675) (emphasis in original).

The AFL-CIO similarly complained that Title II "poses an immediate, direct and substantial threat to the AFL-CIO's historic role in advocating for progressive social legislation, influencing other government actions affecting workers and their families, and educating union members and the general public about these issues." Br. for AFL-CIO Appellants/Cross Appellees at 1-2, 540 U.S. 93 (2003) (No. 02-1755). Its brief characterized the AFL's ads within the scope of Title II as follows:

> The AFL-CIO spends millions of dollars annually for television, radio and cable advertisements on a wide variety of social and economic issues. This program began in the wake of the 1994 national election, when the organization ran numerous radio and television ads to mobilize union households and the general public to oppose the new Republican-controlled Congress's attempts to enact the "Contract with America," including major cuts in federal funding for jobs, health and safety, housing, school lunches and the Medicare and Medicaid programs. . . . Virtually all of these ads urged viewers or listeners to call named Members of Congress to oppose the budget cuts. Several of these ads would have been banned if BCRA § 203 had been in effect. . . .

Id. at 2 (footnotes and internal citations omitted).

This Court rejected these arguments in *McConnell*, upholding Title II in its entirety and concluding that so-called "issue ads," including grassroots lobbying ads, were permissibly encompassed within Title II. The Court explicitly recognized that Title II was constitutional even though in rare cases it could cover "genuine issue ads," 540 U.S. at 206, because such ads could be run "by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* (footnote omitted).

Before the District Court, WRTL admitted that its argument about the impact of BCRA's electioneering communication provisions on grassroots lobbying – the foundation of its case before this Court – had already been "argued strenuously" to this Court in *McConnell*. Pl. Mem. at 20, *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260 (D.D.C. May 9, 2005) (thee-judge court). WRTL then complained that this Court "utterly ignored the argument," *id.*, and concluded from this Court's supposed silence that therefore "such considerations were left for another, as-applied challenge," *id.*

But given the centrality of the argument about grassroots lobbying ads made by the numerous challengers in *McConnell*, it is clear that this Court did not "ignore" the argument, but rather fully considered and rejected it. This Court surely understood – multiple plaintiffs highlighted precisely this point – that the statute could encompass preelection ads *even if* those ads simply urged a Member of Congress to vote one way or the other on a piece of pending legislation. This Court did not hold such ads outside the proper scope of Title II and did not suggest that the statute might be unconstitutional as applied to such ads. Confronted then with all of the same arguments that WRTL now makes here, this Court did not state or even imply that it was postponing for another day a future challenge to the statute as applied to such ads. Rather, this Court upheld the "bright line" test drawn by the statutory definition of electioneering communications notwithstanding any incidental effect on grassroots lobbying.

2. The Ads Themselves Are Identical.

To support its argument that so-called "grassroots lobbying" should be exempted from the coverage of electioneering communications, WRTL submitted to the District Court three ads featuring Wisconsin's Senator

Russell Feingold that it planned to run shortly before the 2004 congressional elections. *See* Jurisdictional Statement app. at 13a-17a (containing storyboards of ads). These ads are virtually identical to many of those the plaintiffs submitted in *McConnell*.

All three of WRTL's ads, with only slight variation, attacked "a group of Senators [for] using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote." Two argued that these senators' actions meant that "qualified candidates [don't get] a chance to serve" while the third argued that these senators were "blocking qualified nominees." All three claimed "[i]t's politics at work . . . causing gridlock" and urged the audience to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." Two made the hyperbolic claim that the filibuster was leading to "a state of emergency." Not a single ad, moreover, explained to the listener *how* to contact Senators Feingold and Kohl. Nowhere in the ads did the Senators' phone numbers, mail addresses, email addresses, fax numbers, or URLs appear. (The ads contain the address for a website funded by WRTL, where contact information for the Senators may have been available, but no such information was in the ads themselves.) Without such information, of course, grassroots lobbying is particularly difficult. How does one lobby a representative if one does not know how to contact him? These ads were either peculiarly inept or aimed at something other than grassroots lobbying: traditional electioneering.

This Court considered ads very much like these when it upheld BCRA's Title II in *McConnell*. Senator McConnell, the lead plaintiff, submitted storyboards of fifteen ads as the complete Appendix to his Supreme Court brief. *See* Br. For Appellants/Cross-Appellees Senator Mitch McConnell *et al.*, app. at 1a-15a, 540 U.S. 93 (2003). Three of these ads are virtually identical to WRTL's:

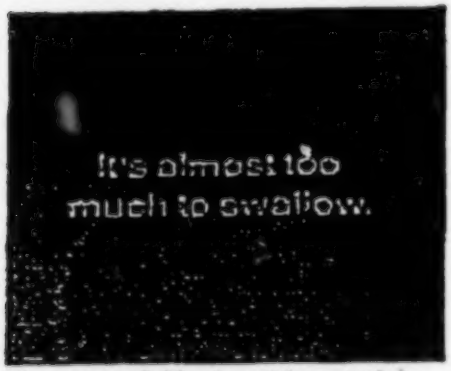
4a

CMR

Ad Detector

BRAND:	DEMOCRATIC ST CNTRL CMT+
TITLE:	CCS/No Matter Who Goes To DC
COMMERCIAL:	CCS/No Matter Who Goes To DC
LENGTH:	30
FRAMES:	7

A005P3G0.ESB

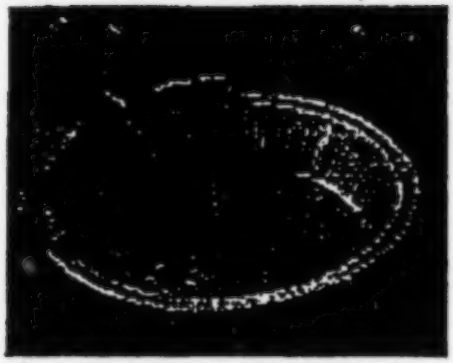


[Announcer] It's almost too much to swallow. Year after year the federal government takes a bigger piece of the pie.

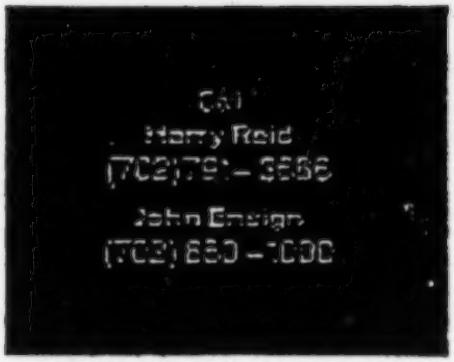
In fact in 1998 we'll pay more in federal taxes than at any time in American

history except for World War II. And now with the budget surplus,

in thirty years all the Washington politicians can talk about is getting their hands



on more of your dough. Call Harry Reid and John Ensign tell them no matter who



goes to Washington you want them to cut your taxes. Otherwise they'll be

nothing left but the crumbs.

Id. at 4a.

5a

CMR

BRAND: ALLIANCE/QLTY NRSNG HMCR+
TITLE: AQNHC/Call Al Gore Restore Cuts
COMMERCIAL: AQNHC/Call Al Gore Restore Cuts
LENGTH: 30
FRAMES: 7

Ad Detector

A007ESGJ.ES3

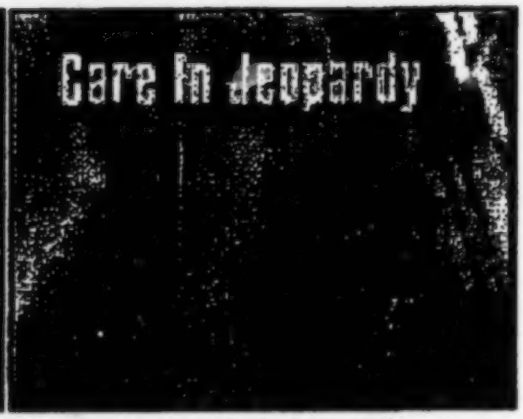
[Announcer]: Call. Tell Al Gore to fight to restore nursing

home funding. [Shawberg]: "Please Vice President Gore, restore the medicare cuts

and keep the promise."

[Announcer]: Medicare cuts to nursing homes threaten quality care. This year the Clinton-Gore Administration is spending $3.5

billion less than Congress provided for nursing home care. No wonder



care for seniors is in jeopardy. [Shawberg]: "This isn't about politics,

it's about people. These cuts are hurting patient care. It's just wrong."

Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

Id. at 5a.

2a

CMR

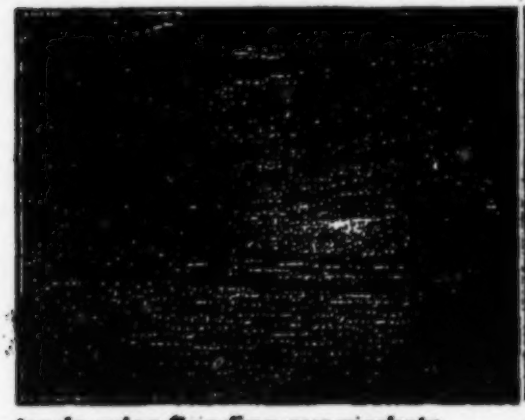
Ad Detector

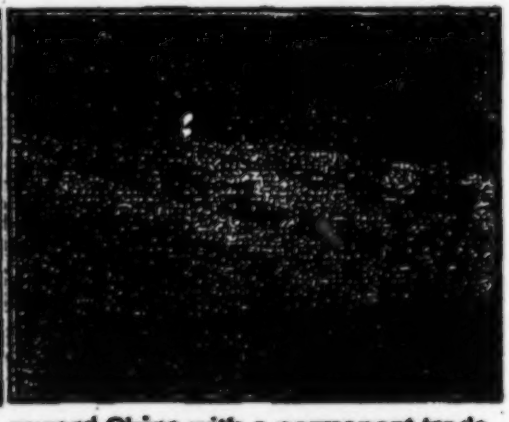
BRAND:	POL-UNKNOWN+
TITLE:	AFL/Made In China Myrick
COMMERCIAL:	AFL/Made In China Myrick
LENGTH:	30
FRAMES:	6

A0074HN3.ES8

[Announcer]: Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as

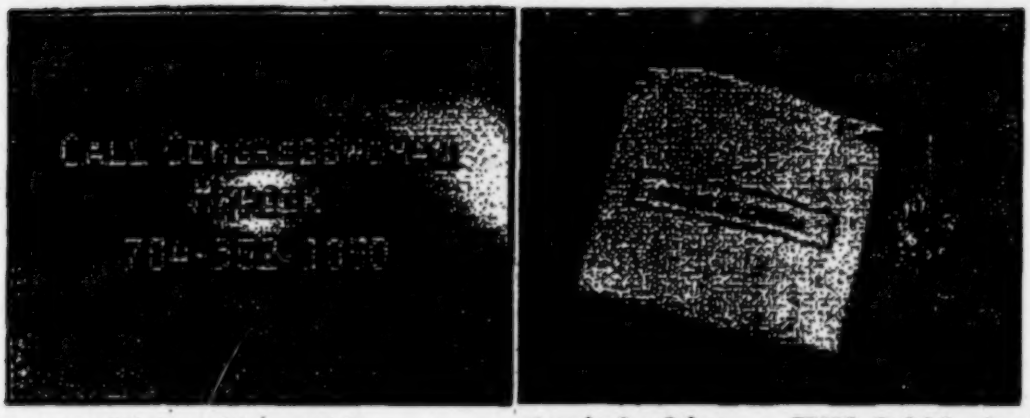
13 cents an hour, of a country that routinely violates





trade rules flooding our markets draining American jobs. Now Congress is set to scrap its annual review of China's record and

reward China with a permanent trade deal. Tell Congresswoman Myrick



to vote "No" and keep China on probation until this label

stands for fairness. [DIS]: Paid for by the AFL-CIO.

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703-683-7110
www.politicsontv.com

Id. at 2a.

There is no real difference between the three ads WRTL asks to be exempted here and these three presented in *McConnell*. Each of the three *McConnell* ads states a policy position and urges the audience to contact a politician running for election in order to press him to vote a certain way. The first *McConnell* ad, in fact, meets *all* of the criteria WRTL believes "indicate that [its own ads] were authentic grassroots lobbying and not electioneering," the second arguably meets all of them, and the third meets all but one. (Unlike the WRTL ads, it is true, none of the *McConnell* ads listed a website where the viewer could find more information about the sponsoring organization, its positions on issues and the candidates, and how to contact the candidates themselves.) WRTL identifies these criteria as follows:

> As to *topic*, they concerned only a legislative matter that was specific and dealt with an issue in which WRTL had a clear and long-held interest. As to *timing*, the legislative action was under active consideration by the Senate then in session; the filibuster problem was coming to a head at the time; the timing was beyond the control of the communicator; and the ads were run outside the prohibition period as well as being planned to run within it. As to candidate *reference*, the only reference to a clearly-identified federal candidate was a statement urging the public to contact the candidate and to ask that he take a particular position on the legislative matter; the ads contained a link to contact information for the Senators (by reference to a website); and the ads identified two incumbent Senators, only one of which was up for election, and referred to the candidate and non-candidate equally. As to *tone*, the ads contained no reference to any political party, to the candidate's record or position on any issue, to the candidate's character, qualifications,

> or fitness for office, or to the candidate's election or candidacy; and they contained no words that promoted, supported, attacked, or opposed the candidate. . . . The ads were broadcast independent of any candidate or political party. These details demonstrate that, under any reasonable test, the ads were genuine grassroots lobbying.

Br. for Appellant at 4 n.4. The only criterion the second and third *McConnell* ads do not clearly meet is that they do not reference politicians who are *not* candidates in the upcoming federal elections. (The second ad, however, does feature another person, but she is not a politician.) This one distinction cannot make a constitutional difference. Otherwise, all the electioneering communications in *McConnell* could have avoided coverage by simply mentioning a non-candidate somewhere in the ad.

3. Since "Grassroots Lobbying" Ads Often Are the "Functional Equivalent of Express Advocacy," They Should Receive No Exemption.

All the remaining twelve ads the lead plaintiff presented to this Court in *McConnell* are identical to those WRTL presents now but for one additional distinction. The remaining twelve *McConnell* ads all identify or suggest the position that the mentioned candidate takes on the particular policy. Four of these ads, for example, argue in favor of term limits and indicate where one or more candidates stand on the issue before exhorting the listener to make contact. *See* Br. for Appellants/Cross-Appellees Senator Mitch McConnell *et al.*, app. at 1a, 7a, 11a & 13a. The others make the same type of pitch with respect to other hot-button issues. They all avoid urging listeners to vote any particular way or even mentioning the up-coming candidate election. They do not need to mention these things, of course. The voter knows that much and can be counted on to place each ad within its obvious context and

understand its point – to vote for or against particular candidates. As this Court recognized in *McConnell*, these ads' indirect direction is direction nonetheless and makes the ads "the functional equivalent of express advocacy." 540 U.S. at 206. Considered in their actual context, WRTL's three ads would have had the same effect.

At the time of the 2004 election, Senate filibustering of judicial nominees was a key issue in the Wisconsin Senate race, as well as a national, partisan campaign issue. All three Republican Senate candidates had made it a key issue in their primary races, as had the state Republican Party, which listed this issue as one of four reasons to defeat Senator Feingold. *See* Def. Federal Election Commission's Exs. Submitted in Supp. Of Its Opp'n to Pl.'s Mot. For a Prelim. Inj., Ex. 15 at 2, *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260 (D.D.C. May 9, 2005) (three-judge court). Further, WRTL itself and its affiliated PAC made the judicial filibuster a campaign issue, citing it both as a reason they had endorsed the three Republican opponents of Senator Feingold and as a reason that one of their "top election priorities" was "to send Feingold packing!" *See id.* Ex. 4 (WRTL PAC); Ex. 20 (WRTL). WRTL's PAC said that "the defeat of Feingold must be uppermost in the minds of the Wisconsin right to life community in the 2004 elections." *See id.* Ex. 4 at 2. And the PAC chair stated, "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." *See id.*

These statements were entirely consistent with WRTL's past electoral positions. Through its PAC, it has made significant independent expenditures to defeat Senator Feingold, as has the National Right to Life PAC. In fact, WRTL PAC's FEC reports itemizing its independent expenditures in the 1992 and 1998 congressional elections list 100 percent of its independent expenditures as opposing Senator Feingold. *See id.* Exs. 8 & 9.

WRTL also heavily publicized Senator Feingold's support of the judicial filibuster and issued several press releases criticizing him for his vote. In this context, the fact that its proposed electioneering communication ads did not *themselves* specifically state Senator Feingold's position on the issue matters little, since WRTL had already used other means to publicly disseminate Senator Feingold's position, as did his three Republican opponents and the Republican state party, all of whom had attacked Senator Feingold repeatedly for his position.

Thus, when WRTL's electioneering communication ads referred to Senator Feingold in the context of criticizing "a group of Senators" for conducting an ongoing filibuster that is "not fair" and "causing gridlock," it was implausible to maintain that this criticism would not attach to Senator Feingold and affect his Senate race.

In this context, WRTL's representation that its proposed electioneering communication ads to Wisconsin voters in the immediate preelection period have *only* a grassroots lobbying purpose strains credulity past the breaking point. The facts that the topic of these ads – the Senate filibuster of judicial nominees – was one that both the Republican Senate candidates and WRTL identified as a key campaign issue and that the ads gave their listeners no direct information about how to contact any candidates undermine WRTL's claim that these electioneering communications amount to no more than grassroots lobbying.

4. WRTL's Suggested Test for "Grassroots Lobbying" Would Exempt Nearly All Electioneering Communications That Avoid Express Advocacy.

WRTL does not formally propose a test to identify grassroots lobbying communications. Its brief, however, approvingly cites the Internal Revenue Service's ("IRS")

definition and suggests that that approach should apply here. Br. For Appellant at 20-22. The IRS provides that

> [a] "Grass roots lobbying communication" is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof" and has three "required elements:" (1) "refers to specific legislation" (2) "reflects a view on such legislation," and (3) "encourages the recipient of the communication to take some action with respect to such legislation."

26 C.F.R. § 56.4911-2(b)(2)(i)-(ii) (2005). As WRTL notes, "grassroots lobbying" is contrasted to "political intervention," which is more heavily regulated. "Political intervention" is defined as

> the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

26 U.S.C. § 527(e)(2) (2005). Adopting just the IRS's definition of grassroots lobbying, as WRTL's brief seems to suggest, poses several problems.

First, it would not even fit the facts of this case. Although WRTL repeatedly argues that its ads are intended to influence public opinion on "legislation," they do not do so under the IRS's definition. All three ads take a position on filibustering of judicial nominees. Under the IRS framework, this constitutes restricted "political intervention" since it "attempt[s] to influence the selection . . . or appointment of any individual to any Federal . . . office. . . ." *Id.* The ads, moreover, do not meet a single one of the definition's requirements for grassroots lobbying. They neither "refe[r] to specific legislation," "reflec[t] a

view on such legislation," nor "encourag[e] the recipient of the communication to take some action with respect to such legislation." 26 C.F.R. § 56.4911-2(b)(2)(i)-(ii) (2005). Filibustering of nominees simply does not concern "legislation." *See id.* § 56.4911-2(d)(1) (defining "legislation"). And, even if it did, WRTL's failure to include any contact information in the ads themselves would independently disqualify them. *See id.* § 56.4911-2(b)(iii)(B) (requiring that communication "[s]tate the address, telephone number or similar information of a legislator"). In other words, even the capacious test WRTL suggests here would offer its own ads no protection.

More importantly, this test would exempt from coverage many electioneering communications that are "the functional equivalent of express advocacy," which this Court found Congress can regulate. *McConnell*, 540 U.S. at 206. Several of the ads Senator McConnell cited as protected issue advocacy in his leading brief, for example, meet the IRS test of legislation. Still more troubling, the one ad this Court cited in *McConnell* as a clear example of sham issue advocacy would pass it as well with two minor emendations. In *McConnell*, this Court noted that although ads avoiding express words of advocacy "do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id.* at 193. In a footnote, it then gave a strong example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks

> about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

Id. at 193-94 n.78 (internal citations omitted). Even though the notion that this ad discusses mere issues "strains credulity" the ad itself would be protected as "grassroots lobbying" under WRTL's suggested definition if only the final two words of the ad itself, "family values," were changed to refer to specific legislation and it contained a phone number where Bill Yellowtail could be reached. In that case, it would meet all three parts of the IRS test. It would (1) "refe[r] to specific legislation," (2) "reflec[t] a view on such legislation," and (3) "encourag[e] the recipient of the communication to take some action with respect to such legislation." WRTL's proposed definition, in other words, could exempt even the most egregious ads in *McConnell* as "grassroots lobbying."

B. As Applied to Tax-Exempt Organizations, BCRA's Electioneering Communications Provisions Are Clearly Constitutional.

WRTL, Br. for Appellant at 21 n.18, and the "public charities" that support it, *see Amicus* Br. of A Coalition of Public Charities, all argue that BCRA's electioneering communications provisions place so-called § 501(c)(3) organizations in a special bind. According to them, § 501(c)(3) organizations, unlike § 501(c)(4)s, have no alternative ways to make electioneering communications. They are simply silenced. This is not true and their larger argument – that their central function in provoking public discourse, on which their favorable tax treatment is based,

heightens any First Amendment concern applying to corporations generally – gets the law exactly backwards.

Rather than raising special First Amendment concerns, § 501(c)(3) organizations' favorable tax status reduces any worry. In short, they are demanding not just the right to run electioneering communications in the service of so-called "grassroots lobbying," but the right to do so with public money. The First Amendment, however, does not require the public to help pay for their political activity. As this Court has long recognized, "since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned." *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

1. The First Amendment Does Not Require Congress to Subsidize Any Form of Political Speech.

WRTL and the § 501(c)(3)s supporting it all receive generous tax benefits from the federal government. WRTL enjoys an exemption from federal income taxes under § 501(c)(4) of the IRC and its supporting charities enjoy a similar exemption under § 501(c)(3). *See* 26 U.S.C. §§ 501(c)(3) & (4) (2000). In addition, taxpayers who contribute to these § 501(c)(3) organizations may deduct the amounts of their contributions on their federal income tax returns under § 170(c)(2). *See* 26 U.S.C. § 170(c)(2) (2000). The federal government grants both types of organizations, but particularly § 501(c)(3)s, a great amount of financial support through the tax system.

This Court has long recognized, in fact, that

> [b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same

> effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.

Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) (footnote omitted); *see also Leathers v. Medlock*, 499 U.S. 439, 450 & n.3 (1991); *Cammarano*, 358 U.S. at 512-13.

No entity has a right to such support from the federal government. "[T]ax exemptions and deductions," like appropriations, "are a matter of grace [that] Congress can, of course, disallow . . . as it chooses." *Taxation With Representation*, 461 U.S. at 549 (quoting *Commissioner v. Sullivan*, 356 U.S. 27, 28 (1958)) (internal quotation marks omitted). This is true even when the entity wishes to exercise a constitutional right. "[A] legislature is not required to subsidize First Amendment rights through a tax exemption or deduction." *Leathers v. Medlock*, 499 U.S. at 450; *see also Taxation With Representation*, 461 U.S. at 545 ("This Court has never held that Congress must grant a [tax] benefit . . . to a person who wishes to exercise a constitutional right."); *id.* at 546 ("We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.") (quoting *Cammarano*, 358 U.S. 498, 515 (Douglas, J., concurring)) (internal quotation marks omitted).

Subject to one exception, so long as the government does not "discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas,'" *Taxation With Representation*, 461 U.S. at 548 (quoting *Cammarano*, 358 U.S. at 513), and allows alternative means for political expression, it may restrict the political

activities of those who receive tax subsidies.[2] In *Cammarano*, in fact, this Court explicitly rejected a claim that disallowing tax deductions spent on grassroots lobbying – there described as "expenditures made in connection with efforts to promote or defeat the passage of legislation by persuasion of the general public as opposed to direct influence on legislative bodies," 358 U.S. at 504 – violated the First Amendment. "Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation," it held, "is plainly not 'aimed at the suppression of ideas.'" *Id.* at 513 (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)). In *Cammarano*, moreover, this Court noted that it had previously disallowed deductions for grassroots lobbying expenses, such as expenditures for "matters of publicity, including the making of arrangements for speeches, contacting the press, in respect of editorial comments, and news items, and for the preparation of brochures involving a comprehensive study of the [underlying issue] all designed to influence the opinions of the general public." *Id.* at 504-05 (describing *Textile Mills Security Corp. v. Commissioner*, 314 U.S. 326 (1941)) (internal quotation marks and citations omitted). More recently, this Court has made clear that this test requires only "viewpoint neutrality." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995). The electioneering communications regulations clearly meet this test. These sensible restrictions do not promote any viewpoint, ideology, political party, or candidate above any other. Thus, BCRA's restriction on WRTL's use of its tax-exempt treasury funds for "electioneering communications" is well within the bounds of existing

[2] The one exception is for ideological nonprofit advocacy organizations which meet the three-part test of *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263-64 (1986). WRTL and its supporting "public charities" choose not to meet this test.

doctrine, which allows the government to impose conditions on the receipt of public subsidies.

2. Like WRTL, § 501(c)(3) Organizations Have Alternative Means To Disseminate Electioneering Communications.

As WRTL admits, it has the right to spend for any electioneering communications out of its connected PAC. Br. for Appellant at 5-6. It did not want to do so, however, because those funds "would not have been sufficient" and because it wanted to preserve them for federal contributions and independent expenditures. *Id.* at 6. This is, of course, its right. But the desire to preserve its PAC funds does not make the requirement to use PAC funds for electioneering communications a constitutionally insufficient alternative – for WRTL or for any other corporation.

In the case of WRTL, however, the point is even stronger, for WRTL has no right to demand that the public augment its funds through tax subsidy. Although WRTL "does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Taxation With Representation*, 461 U.S. at 550 (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)) (internal quotation marks omitted).

As this Court noted in *FEC v. Beaumont*,

> [t]he PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure without jeopardizing the associational rights of advocacy organizations' members.

539 U.S. 146, 163 (2003) (internal citations omitted). Except in the special case of ideological non-profits meeting the strict requirements of *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238, 263-64 (1986), this Court has found – unanimously – that this alternative provides corporations and unions with a "constitutionally sufficient, opportunity" to disseminate electioneering communications. *See McConnell*, 540 U.S. at 203 & n.86.[3]

WRTL and the § 501(c)(3) corporations that support it claim that no such alternative is available to § 501(c)(3) organizations. Br. for Appellant at 42 n.30; Br. of A Coalition of Public Charities at 14-15. This is simply wrong. Although § 501(c)(3) organizations cannot themselves set up and administer PACs, they can set up separate § 501(c)(4) organizations which can. Indeed, WRTL is itself such an affiliate of a § 501(c)(3) organization, The Wisconsin Right to Life Foundation, Inc., *see* The Wisconsin Right to Life Foundation, *at* http://www.wrtl.org/foundation.htm (describing its 501(c)(3) affiliate as "exist[ing] to sustain the long-term viability of Wisconsin Right to Life. . . ."), and already has a PAC capable of running electioneering communications, *see* Br. of Appellant at 5-6.

This Court has clearly held that a § 501(c)(3) organization's ability to create an affiliate which itself can engage in protected speech activities cures any constitutional problem with restricting the activities of the § 501(c)(3) organization itself. In *Taxation With Representation*, for example, this Court noted that Taxation With Representation (TWR), which challenged the IRS's denial of § 501(c)(3) status on account of its lobbying activities,

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[3] WRTL, of course, could also make unlimited electioneering communications if it simply foreswore corporate and union contributions. *McConnell v. FEC*, 540 U.S. at 209-11 (listing criteria for constitutional exemption to electioneering communications). This it refuses to do.

> could still qualify for a tax exemption under § 501(c)(4). It also appears that TWR can obtain tax-deductible contributions for its nonlobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for nonlobbying activities and a § 501(c)(4) organization for lobbying. TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize.

461 U.S. at 544 (footnote omitted). The concurring opinion made the point explicit. Notwithstanding that § 501(c)(3)'s ban on lobbying "denies a significant benefit to organizations choosing to exercise their constitutional rights," *id.* at 552 (Blackmun, J., concurring) (footnote omitted), "[a] § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its non-lobbying activities," *id.* at 553.

In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court reaffirmed this reasoning. In striking down a statutory provision that forbade any noncommercial educational broadcasting station receiving a grant from the Corporation for Public Broadcasting from engaging in editorializing, this Court found the absence of such an alternative fatal. The "statutory [§ 501(c)(4)] alternative," in *Taxation With Representation*, it explained, meant "that Congress ha[d] not infringed any First Amendment right or [even] regulated any First Amendment activity; it had simply chosen not to pay for TWR's lobbying." *Id.* at 400 (quoting *Taxation With Representation*, 461 U.S. at 546) (internal quotation marks omitted). Moreover,

> if Congress were to adopt a revised version of [the FCC provision] that permitted noncommercial educational broadcasting stations to establish "affiliate" organizations which could then

> use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of *Taxation With Representation*. Under such a statute, public broadcasting stations would be free, in the same way that the charitable organization in *Taxation With Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities. But in the absence of such authority, we must reject the Government's contention that our decision in *Taxation With Representation* is controlling here.

Id. at 400-01 (internal citations and footnote omitted).

If § 501(c)(3) organizations can set up affiliated § 501(c)(4) entities, which in turn can set up affiliated PACs, there can be no constitutional objection to § 501(c)(3) organizations' inability to make electioneering communications directly. They can make as many as they want; they just cannot use public money. This Court has, of course, defined a small category of organizations for which this alternative is not adequate. *See FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 263-64 (1986). WRTL and its supporting "public charities," however, have chosen not to be among them.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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